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IN THE

Supreme Court of the United States

October Term, 1966

No. 631

DIRECTORS GUILD OF AMERICA, INCORPORATED,
Petitioner,

vs.

LEO HURWITZ, LEE R. BOBKER, ROBERT BRAVERMAN, GENE SEARCHINGER, DARRELL RANDOM, and HILARY T. HARRIS, on their own behalf and on behalf of all others similarly situated as members of the SCREEN DIRECTORS INTERNATIONAL GUILD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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DIRECTORS GUILD OF AMERICA, INCORPORATED,
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vs.

LEO HURWITZ, LEE R. BOBKER, ROBERT BRAVERMAN, GENÉ SEARCHINGER, DARRELL RANDOM, and HILARY T. HARRIS, on their own behalf and on behalf of all others similarly situated as members of the SCREEN DIRECTORS INTERNATIONAL GUILD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Directors Guild of America, Incorporated, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on the 14th day of July, 1966 which reversed the order of the District Court for the Southern District of New York (Levet, *J.*).

Opinions Below

The opinion of the Court of Appeals which is not reported is reprinted in the Appendix, p. 2a, *infra*. The decision of the District Court for the Southern District of New York and the memorandum endorsement denying the motion to reargue are not reported, and both are reprinted in the Appendix, pp. 21a-24a, *infra*.

Jurisdiction

The order of the Court of Appeals was entered on the 14th day of July, 1966 (Appendix, p. 25a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The basis of jurisdiction in the District Court was 28 U.S.C. Section 1332(a); Section 102 of the Labor, Management and Disclosure Act of 1959 (29 U.S.C. Section 412); Section 301(a) of the Labor, Management Relations Act (29 U.S.C. Section 185(a)); 28 U.S.C. Section 1331, and the First and Fifth Amendments to the United States Constitution.

Questions Presented

1. When a case came before the Court of Appeals on appeal from denial of a preliminary injunction, did the Court have jurisdiction to render a judgment on the merits in favor of the plaintiff when there had been no trial or hearing and when it did not have the defendant's answer before it and the record was entirely bare of any pleading other than the complaint?

2. Whether the holding of the Court of Appeals that a non-Communist oath was vague completely disregarded the decision of this Court on a substantially identical oath in *Communications Association* v. *Douds*, 339 U.S. 382, where only one member of this bench expressed the view that the oath was vague?

3. Was the appeal below moot when that appeal sought reversal of the District Court's denial of a preliminary injunction, when the injunction application sought to enjoin an election, the counting of ballots and the seating of elected representatives,—all of which had been finalized and effected before the appeal came on to be heard?

Statutes Involved

The statutory provision involved is 28 U.S.C. Section 1292(a)(1).

Statement of the Case

Petitioner, Directors Guild of America, Incorporated (hereinafter referred to as "DGA") is a union of movie and television directors and others.

Respondents are members of the Screen Directors International Guild (hereinafter referred to as 'SDIG").

In July of 1965 a merger agreement was entered into between DGA and SDIG providing in substance that the merged organization would continue under the name of DGA, and providing that SDIG members would automatically acquire membership in the merged union subject to only one condition—that they sign and submit an application to the merged organization containing an oath, reading as follows:

> "I am not a member of the Communist Party or affiliated with such party, and I do not believe in, and I am not a member nor do I support any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods."

The Respondents evidenced their willingness to sign and submit an application but refused to execute the oath. Based on their refusal to execute the oath they were refused membership in the merged organization.

Also contained in the merger agreement was a provision that SDIG members would vote for two representatives on the DGA National Board, and for thirteen members of the DGA Eastern Directors Council.

On or about August 28, 1965 all of the SDIG members, including the Respondents, received a ballot for the election

of representatives to the National Board and Council, with an admonition that no ballot would be counted in such election unless the oath had been sworn to.

On or about September 17, 1965 Respondents then served a complaint for a declaratory judgment and permanent injunction and moved by ex parte order for a preliminary injunction to enjoin DGA, pending the final hearing and determination of the action, from (a) counting the ballots submitted by the members of the DGA for the election of two representatives of the SDIG to its National Board and other representatives to its Eastern Directors Council; (b) effectuating that election; (c) refusing to accept the Respondents as members of the DGA, and (d) refusing to count the ballots submitted by the Respondents.

The order to show cause was signed before the merger agreement was executed, before the ballots were counted, and before the members were seated.

Argument on whether a preliminary injunction should be granted came on to be heard before Hon. Richard H. Levet on September 21, 1965. On September 23, 1965 Judge Levet issued an opinion, judgment and order denying the Respondents' motion for a temporary restraining order and a preliminary injunction. The District Court opinion stated in part:

> "Anti-communist provisions in union constitutions have been before the courts previously and have weathered judicial scrutiny. (citing cases)
>
> "In light of these authorities, I must conclude that the plaintiffs have not made a clear showing that they are likely to succeed.
>
> "Neither have the plaintiffs shown that irreparable injury will result if the preliminary injunction is denied. They claim that lack of union membership will be a serious impediment to securing employment opportunities. It would seem, however, that damages will compensate for any lost employment. Also, no

showing has been made that irreparable harm will result if the plaintiffs' ballots are not counted in the forthcoming election."

On October 27, 1965 Judge Levet denied a motion for leave to reargue.

Prior to the time that the appeal was heard by the Court of Appeals, the election had taken place and the representatives of the former SDIG were seated.

On appeal by the Respondents to the Court of Appeals for the Second Circuit, the District Court order was reversed. The opinion said, among other things (per Lumbard, Ch. J.):

> "This appeal reaches us in a curious posture. The plaintiff's motion for a preliminary injunction is moot to the extent that it sought to interfere with the DGA elections completed in September 1965. However, the plaintiffs also requested a mandatory preliminary injunction compelling DGA to admit them to membership in the surviving union *pendente lite*. The district court's denial of this portion of plaintiffs' motion is not moot, since plaintiffs have continued to refuse to sign the oath and DGA has continued to refuse them membership."

and the opinion continues:

> "As it is our opinion that the DGA loyalty oath is *per se* an unreasonable and unlawful requirement for union membership, an initial question is whether this court may go beyond review of the denial of a preliminary injunction and direct entry of a judgment for plaintiffs on the merits."

That portion of the opinion concluded:

> "For the reasons explained below, we conclude that the DGA oath is unreasonable as a matter of law and that plaintiffs should prevail on the merits."

With respect to the holding in *Communications Association* v. *Douds*, 339 U. S. 382, the Court, recognizing that the question was important and substantial, said:

> "Whether a union may require its members to sign a non-Communist oath is a difficult question and apparently one of the first impression. At first glance, it might seem that the oath is clearly reasonable in light of *Communications Association* v. *Douds*, 339 U. S. 382 (1950), where an evenly-divided Supreme Court upheld the constitutionality of Section 9(h) of the National Labor Relations Act,[1] which barred the N.L.R.B. from acting on behalf of any union whose *officers* had not filed with the Board an oath substantially identical to that required by DGA here. However, even leaving aside the question whether that decision had been overruled by later opinions such as *United States* v. *Brown*, 381 U. S. 437 (1965), we do not think it controls the issue of whether such an oath is a reasonable requirement for union *membership*." (Emphasis the Court's)

By substituting its own judgment for the judgment of the District Court, by disregarding the clear jurisdictional provisions of 28 U.S.C. 1292(a)(1), and by in fact, substituting its judgment for the judgment of the Supreme Court in *Communications Association* v. *Douds, supra*, the Court of Appeals disregarded well settled principles of law and arrogated to itself a jurisdiction expressly denied it by the Congress of the United States and by this Court.

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals was without jurisdiction to render a judgment on the merits on the appeal from the denial of a motion for a preliminary injunction.

The Court of Appeals recognized that when it, in effect, directed a verdict for the plaintiff there was no precedent for such action. It cited *Meccano Ltd.* v. *John Wanamaker*, 250 Fed. 450 (2 Cir. 1919), aff'd 253 U. S. 136, as a Court

of Appeals case where the Court refused to pass on the question as to whether it had such power. What the Court apparently did not realize is that this Court in *Meccano Ltd.* v. *John Wanamaker, supra,* had expressly treated that question and found that the Circuit Court did not have the power. This Court said (at page 141):

> "Petitioner maintains that its motion for final decree upon the merits should have been sustained. But the appeal was from an interlocutory order, and the court could only exercise powers given by statute. On such an appeal a cause may be dismissed if it clearly appears that no ground exists for equitable relief; but finally to decide a defendant's rights upon the mere statement of his adversary, although apparently supported by ex parte affidavits and decrees of other courts, is not within the purview of the act. He is entitled to a day in court, with opportunity to set up and establish his defenses. The motion for final judgment was properly overruled. Eagle Glass & Mfg. Co. v. Rowe, 245 U. S. 275, 281, 62 L. ed. 286, 289, 38 Sup. Ct. Rep. 80."

This Honorable Court should reassert its supervisory power over proceedings in the lower Federal Courts and fix guide lines with respect to the jurisdiction of the Court of Appeals to render determinations on the merits in favor of plaintiffs on appeal from interlocutory orders with a barren record. In this area, this Court has only once before expressed itself in *Meccano Ltd.* v. *John Wanamaker, supra,* and, that expression was completely disregarded by the Court of Appeals.

II

The holding by the Court of Appeals that the language of the oath was vague and uncertain, was in effect to overrule the decision of this Court in Communications Association v. Douds.

The Court of Appeals conceded in its opinion, page 2663 (Appendix, p. 18a, *infra*), that the language of the oath which it held to be vague and uncertain was substantially identical with the oath in *Communications Association* v. *Douds*. In the *Douds* case Mr. Chief Justice Vinson said, at page 412:

> "There remain two contentions which merit discussion. One is that § 9(h) is unconstitutionally vague. . . .
>
> "The argument as to vagueness stresses the breadth of such terms as 'affiliated,' 'supports' and 'illegal or unconstitutional methods.' There is little doubt that imagination can conjure up hypothetical cases in which the meaning of these terms will be in nice question. The applicable standard, however, is not one of wholly consistent academic definition of abstract terms. It is, rather, the practical criterion of fair notice to those to whom the statute is directed. The particular context is all important."

III

The appeal was moot and should have been dismissed.

Since the election sought to be enjoined had taken place and since the ballots of the Respondents were not counted and since the elected representatives had been seated, there was no issue before the Court of Appeals on which it could effectively rule. The Court's position that the Respondents had requested a mandatory preliminary injunction compelling the Petitioner to admit them to membership was

an assumption of jurisdiction which in fact it did not have, for the grant of such relief would in effect be judgment on the merits. None of the affidavits in support of the motion for a preliminary injunction was addressed to the Respondents' immediate admission to the membership.

In *Colpo* v. *Highway Truck Drivers,* 305 Fed. 2d 362 (CA 3rd) cert. denied 371 U. S. 890, where a similar issue was under consideration, the Court held:

> "'Our jurisdiction is limited to cases in controversies involving real and substantial rights of the parties. We think once the election here was held there was no longer before this Court a subject matter on which our judgment could operate . . . and the question became moot.''

To the same effect see:

> *Fink* v. *Continental Foundry & Machine Company,* 240 Fed. 2d, 369 (CA 7), cert. denied 354 U. S. 938.

CONCLUSION

For the reasons heretofore stated petitioner respectfully urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

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(APPENDIX)

APPENDIX A

Statutory provisions involved—28 U. S. C. Section 1292(a)(1).

"§ 1292. Interlocutory Decisions

"(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; . . ."

APPENDIX B

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 329—September Term, 1965.

(Argued April 12, 1966 Decided July 14, 1966.)

Docket No. 30215

LEO HURWITZ, LEE R. BOBKER, ROBERT BRAVERMAN, GENE SEARCHINGER, DARRELL RANDOM, and HILARY T. HARRIS, on their own behalf and on behalf of all others similarly situated as members of the SCREEN DIRECTORS INTERNATIONAL GUILD,

Appellants,

v.

DIRECTORS GUILD OF AMERICA, INCORPORATED,

Appellee.

Before:

LUMBARD, *Chief Judge,*

WATERMAN and ANDERSON, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Richard H. Levet, *J.*, denying plaintiffs' motion for a preliminary injunction directing the defendant union to grant the plaintiffs union membership *pendente lite.*

Reversed and remanded with instructions to enter judgment for the plaintiffs on the merits.

Appendix B—Opinion of the Court of Appeals

NANETTE DEMBITZ, New York, N. Y. (Melvin L. Wulf, American Civil Liberties Union, New York, N. Y., on the brief), *for appellants*.
BERNARD AXLER, New York, N. Y. (Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y., on the brief), *for appellees*.

LUMBARD, *Chief Judge*:

This is an appeal from an order of the United States District Court for the Southern District of New York denying in all respects plaintiffs' motion for a preliminary injunction. In the underlying lawsuit, the plaintiffs have sued to restrain the survivor of a merger between two unions from enforcing upon the members in good standing of the submerged union the defendant-survivor's pre-existing requirement that all its members sign a non-Communist oath. In their motion for a preliminary injunction, plaintiffs sought an order either delaying the merger *pendente lite* or requiring the defendant to admit the plaintiffs to membership pending the outcome of this litigation. We hold that imposition of the vague oath in question was an unreasonable basis for divesting plaintiffs of their long-standing privilege of union membership. Accordingly, we reverse the order of the district court and remand the cause with instructions that the trial court grant such final relief to the plaintiffs as may be appropriate.

I. BACKGROUND OF THIS APPEAL

For many years, the nation's film and television directors were represented by two independent unions, the Directors Guild of America, Inc. (DGA), functioning largely in the West Coast area, and the Screen Directors Interna-

tional Guild (SDIG), a smaller union functioning largely in the East Coast area. Almost from its inception in 1957, the younger SDIG negotiated with DGA to effectuate a merger of the two organizations. Through such a merger, the unions hoped to secure the economic advantages and the collective bargaining strength of a single, nation-wide directors' union.

A major stumbling block to such a merger was Article III, Section H of the DGA constitution, which requires all DGA members to swear to an oath reading:

> "I am not a member of the Communist Party or affiliated with such party, and I do not believe in, and I am not a member [sic] nor do I support any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods."

According to the plaintiffs' affidavits below, this membership oath was adopted by DGA under the pressures of McCarthy era "witch hunts" against suspected subversives in the Hollywood film industry. SDIG never found it necessary to adopt such an oath requirement.

At an SDIG meeting in January 1965, a majority of the members present passed a resolution condemning the DGA's loyalty oath requirement. Nevertheless, on or about July 19, 1965, officials of the two unions signed a proposed merger agreement. Under this agreement, DGA would be the surviving union. SDIG members would become automatic members of DGA, with insurance and other benefits but with no initiation fee assessment, on the single condition that they sign the DGA loyalty oath. To insure that SDIG members would have a proportionate voice in the management of the surviving union, the agreement also provided that the members of SDIG would vote in the fall of 1965 to elect two members to the DGA National Board and thirteen members to the DGA Eastern District Council.

Whatever philosophical objections the SDIG rank and file had to the DGA loyalty oath must have been outweighed by the material advantages of merger, for they ratified the merger agreement by a vote of 439 to 63. On August 28, 1965, ballots were mailed to all SDIG members for the elections described in the agreement. The ballots contained instructions that any SDIG member who failed to execute and file the non-Communist oath would not be considered a DGA member. The ballots of those who signed the oath were to be counted on September 27, 1965, and the merger agreement made final on October 9.

On September 17, 1965, the six plaintiffs, who had been members in good standing of SDIG, brought this action to declare the DGA oath "illegal and unconstitutional," and to direct DGA to admit them to membership without regard to their signing the oath. On the same day, plaintiffs moved for a temporary restraining order and preliminary injunction directing DGA to accept SDIG members as members of DGA without regard to the oath, and enjoining DGA from barring plaintiffs from voting in the September DGA elections because of their refusal to subscribe to the oath.

On September 23, 1965, Judge Levet denied the motion for a preliminary injunction on the alternative grounds that the plaintiffs were not likely to succeed after trial on the merits, and that the plaintiffs had not established that irreparable injury would result if the preliminary injunction were denied.

Though the ballots were due to be counted on September 27, the plaintiffs elected not to seek an immediate appeal of Judge Levet's order. Instead, they moved to reargue on October 11, which motion Judge Levet denied on October 27. In the meantime, the ballots of those who signed the oath were counted, the winning SDIG members were seated by DGA on its National Board and Eastern District Council, and the merger agreement was executed in final form. Plaintiffs filed their notice of appeal on November 22, 1965.

II. Scope of Appellate Review

This appeal reaches us in a curious posture. The plaintiffs' motion for a preliminary injunction is moot to the extent that it sought to interfere with the DGA elections completed in September 1965. However, the plaintiffs also requested a mandatory preliminary injunction compelling DGA to admit them to membership in the surviving union *pendente lite*. The district court's denial of this portion of plaintiffs' motion is not moot, since plaintiffs have continued to refuse to sign the oath and DGA has continued to refuse them membership.

As it is our opinion that the DGA loyalty oath is *per se* an unreasonable and unlawful requirement for union membership, an initial question is whether this court may go beyond review of the denial of a preliminary injunction and direct entry of a judgment for plaintiffs on the merits.

The Judicial Code merely states that "The courts of appeals shall have jurisdiction of appeals from (1) Interlocutory orders . . . refusing . . . injunctions." 28 U. S. C. § 1292(a)(1). As a general rule, when an appeal is taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal. See *Ex parte National Enameling & Stamping Co.*, 201 U. S. 157, 162 (1906); *Drittel* v. *Friedman*, 154 F. 2d 653 (2 Cir. 1946); *Sheldon* v. *Moredall Realty Corp.*, 95 F. 2d 48 (2 Cir. 1938); 6 Moore, Federal Practice ¶54.08[1] (2 ed. 1965). However, this rule is subject to a general exception—the appellate court may dismiss the complaint on the merits if its examination of the record upon an interlocutory appeal reveals that the case is entirely void of merit. See, e.g., *Mast, Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 495 (1900); *Sheldon* v. *Moredall Realty Corp.*, *supra*; 7 Moore ¶65.21, at p. 1702 (2 ed. 1955).

Such an exception serves the obvious interest of economy of litigation, and this interest is equally served if the appellate court directs a verdict for plaintiff in an appropriate case. We have found no case reaching this result, but this is not surprising since it is the rare case that contains no triable issue of fact, and it is rarer still that this would result in a judgment for the plaintiff at the pre-trial stage. In *Meccano, Ltd.* v. *John Wanamaker*, 250 Fed. 450 (2 Cir. 1919), aff'd, 253 U. S. 136, 141-42 (1920), we expressly refused to pass upon this question because the plaintiff did not warrant final relief. Finding no reason why the cautious exercise of such a power would be undesirable, we conclude that we may direct the entry of a judgment for the plaintiffs here.

For the reasons explained below, we conclude that the DGA oath is unreasonable as a matter of law and that plaintiffs should prevail on the merits. Since that portion of the appeal from Judge Levet's denial of a preliminary injunction which is not moot seeks relief *pendente lite* that will be granted permanently (namely, to compel DGA to admit plaintiffs to membership without regard to their signing the oath), we turn to the merits of the plaintiffs' action.

III. Loyalty Oaths and Union Membership

Whether a union may require its members to sign a non-Communist oath is a difficult question and apparently one of first impression. At first glance, it might seem that the oath is clearly reasonable in light of *Communications Association* v. *Douds*, 339 U. S. 382 (1950), where an evenly-divided Supreme Court upheld the constitutionality of Section 9(h) of the National Labor Relations Act,[1] which

[1] 61 Stat. 136, 146 (1947), *repealed*, Public Law 86-257, 73 Stat. 525 (1959).

barred the N. L. R. B. from acting on behalf of any union whose *officers* had not filed with the Board an oath substantially identical to that required by DGA here. However, even leaving aside the question whether that decision has been overruled by later opinions such as *United States* v. *Brown*, 381 U. S. 437 (1965), we do not think it controls the issue of whether such an oath is a reasonable requirement for union *membership*.

Plaintiffs' principal contention, and the only one we will consider, is that the DGA loyalty oath as applied here results in an expulsion of plaintiffs from the union which is contrary to the common law of New York.[2] Plaintiffs claim that they are entitled to reinstatement under the well-settled principle that a union may only expel one of its members after a procedurally adequate hearing at which it is established that the member has violated a valid provision of the union's constitution or by-laws which authorizes his expulsion. See, e.g., *Madden* v. *Atkins*, 4 N. Y. 2d 283, 174 N. Y. S. 2d 633, 151 N. E. 2d 73 (1958); *Polin* v. *Kaplan*, 257 N. Y. 277, 177 N. E. 833 (1931); Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1051-56 (1951).

With respect to this count, defendant claims first, that the plaintiffs were excluded rather than expelled from membership in DGA, and that under New York law the grounds for union exclusions will not be reviewed by the courts; and second, that even if the denial of DGA membership here is termed an expulsion, it was predicated upon a

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[2] Plaintiffs also allege that the DGA oath is contrary to § 102 of the Labor Management Reporting and Disclosure Act, 29 U. S. C. § 412; § 9(a) of the National Labor Relations Act, 29 U. S. C. § 159(a); and the First and Fifth Amendments to the United States Constitution. As there are substantial difficulties with all these theories, not the least of which is the fact that DGA appears to be a union of supervisory employees not subject to the NLRA, we decline to discuss them. There is diversity jurisdiction for the common law count, and the parties have assumed that New York law applies.

loyalty oath which, under all the circumstances, is a reasonable and non-discriminatory prerequisite to union membership.

A. *Expulsion or Exclusion?*

The common law has generally classified labor unions as voluntary associations having great freedom to regulate their internal affairs, including their membership policies, without judicial interference. A wrongful expulsion from a union has traditionally been actionable. See Cox, The Role of Law in Preserving Union Democracy, 72 Harv. L. Rev. 609, 613-19 (1959). However, union expulsions have not been set aside because of their adverse impact on a member's opportunities to keep his job or to associate with his fellow workers. Rather, an improper expulsion has been viewed as a violation of a member's contract with his union, as represented by the organization's constitution and by-laws, or as a deprivation of the member's property rights in the assets of the union. See *Polin* v. *Kaplan*, 257 N. Y. 277, 177 N. E. 833 (1931), *Angrisani* v. *Stearn*, 167 Misc. 729, 3 N. Y. S. 2d 698 (Sup. Ct.), aff'd mem., 255 App. Div. 975, 8 N. Y. S. 2d 997 (1938).[3] See generally Chafee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 1001 (1930).

The contract and the property theories provide no protection to an applicant for union membership since he has no such vested contract or property rights at stake. For this reason, and because the law has likened unions to social

[3] In New York, the analysis was derived from cases involving fraternal insurance associations, *Wilcox* v. *Supreme Council of the Royal Arcanum*, 210 N. Y. 370, 104 N. E. 624 (1914), the New York Stock Exchange, *Cohen* v. *Thomas*, 209 N. Y. 407, 103 N. E. 708 (1913), the New York Produce Exchange, *People ex rel. Johnson* v. *New York Produce Exchange*, 149 N. Y. 401, 44 N. E. 84 (1896), and the like.

clubs having unlimited discretion over admission policies, few courts have recognized a cause of action for wrongful exclusion from union membership. See generally Summers, The Right to Join a Union, 47 Colum. L. Rev. 33 (1947). Though the New York Court of Appeals has apparently not passed on the question, a number of lower New York courts have taken this position. See *Colson* v. *Gellier*, 192 Misc. 520, 80 N. Y. S. 2d 448 (Sup. Ct. 1948); *Murphy* v. *Higgins*, 12 N. Y. S. 2d 913 (Sup. Ct. 1939), aff'd mem., 260 App. Div. 854, 23 N. Y. S. 2d 552 (1940); *Miller* v. *Ruehl*, 166 Misc. 479, 2 N. Y. S. 2d 394 (Sup. Ct. 1938). Defendant claims that it therefore has an absolute right to enforce its membership oath so as to exclude plaintiffs from joining DGA.

On the other hand, the plaintiffs have precisely the property and contract interests which support an action for wrongful expulsion because of their previous membership in SDIG.[4] Moreover, the most compelling practical reason for reviewing union explusions more rigorously than union admission policies stems from the added hardship and disruption that result when an established membership is revoked (particularly of course when that revocation may affect existing employment rights). From this standpoint, plaintiffs certainly deserve the added protection of judicial scrutiny. Although no New York case dealt with the question of expulsion by merger,[5] one federal court has

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[4] All the assets of SDIG, including union rights under its 170 collective bargaining agreements with industry employers, passed to DGA upon execution of the merger.

[5] In *Dunne* v. *Hoffa*, 231 N. Y. S. 2d 352 (Sup. Ct. 1962), the court upheld a merger of seven local unions because the combined membership of the seven had approved the merger even though the plaintiff's local had disapproved it. However, the court expressly noted that there had been no proof that the merger would have any adverse effect on the members of plaintiff's local.

treated as an unlawful expulsion a union reincorporation consummated for the purpose of excluding from the successor organization a dissident group. *Calabrese* v. *United Ass'n of Journeymen*, 211 F. Supp. 609 (D. N. J. 1962), aff'd *per curiam*, 324 F. 2d 955 (3 Cir. 1963). That case is distinguishable to the extent that it involved union bad faith, but we think the same protection should also be conferred upon the members of any union whose officers jeopardize membership status by negotiating a merger with another more restrictive union.

Moreover, the property and contract theories for reviewing union expulsions are not a true reflection of the economic and social interests actually involved in the regulation by unions of their membership. The question of wrongful expulsion can be better analyzed, from the standpoint of the union's interests as well as those of the member, in terms of liability for the tortious infliction of economic injury. See Chafee, *supra*, at pp. 1007-10; Cox, *supra* at p. 614. In many other contexts, the New York courts have adopted the "*prima facie* tort" *doctrine*,[6] and several cases indicate that this doctrine has relevance to the question of whether a deprivation of union membership was lawful. See *Barile* v. *Fisher*, 197 Misc. 493, 94 N. Y. S. 2d 346 (Sup. Ct. 1949); compare *Madden* v. *Atkins*, 4 N. Y. 2d 283, 174 N. Y. S. 2d 633, 151 N. E. 2d 73 (1958). See also *Berrien* v. *Pollitzer*, 165 F. 2d 21 (D. C. Cir. 1947). Given the plaintiffs' strong interest here in continuing membership in a union of film and television directors, we do not think that the New York courts would refuse them

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[6] Under this doctrine, "[*P*]*rima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law . . . requires a justification if the defendant is to escape." *Aikens* v. *Wisconsin*, 195 U. S. 194, 204 (1904) (Mr. Justice Holmes). See *Advance Music Corp.* v. *American Tobacco Co.*, 296 N. Y. 79, 70 N. E. 2d 401 (1946); *Opera on Tour, Inc.* v. *Weber*, 285 N. Y. 348, 34 N. E. 2d 394 (1941).

relief for the reason that they had no "vested" contract or property rights in DGA membership. Therefore, we treat the question of whether DGA's conduct was lawful as though plaintiffs had been expelled from DGA membership.[7]

B. *Is the Oath a Valid Requirement?*

Plaintiffs contend that the merger agreement had the effect of adding the oath requirement to their union's constitution, and that expulsion of an existing member on the basis of such an amendment violates the member's contract rights with the union. Plaintiffs argue that such an expulsion should be unlawful just as an expulsion not authorized by the union's constitution or by-laws is unlawful. See *Polin* v. *Kaplan*, 257 N. Y. 277, 177 N. E. 833 (1931). We disagree.

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[7] In view of this conclusion, we need not reach the plaintiffs' alternative contention that we recognize a cause of action for wrongful exclusion. However, if the denial of union membership is analyzed from the standpoint of tort liability, as we think it should be, we see no sound reason why recovery should not be granted for wrongful exclusion as well as wrongful expulsion. See Blumrosen, Legal Protection Against Exclusion from Union Activities, 22 Ohio St. L. Rev. 21 (1961). This is not to say that the valid grounds for exclusion and expulsion would necessarily coincide—the desirability of allowing unions considerable freedom in selecting their members, plus the more limited injury that normally results from exclusion as opposed to expulsion, would in many cases argue for a very limited review of exclusion policies. But whenever a union reaches a position in an industry where it has a "monopoly" on the employment opportunities within its sphere of influence, we think it can no longer rightfully claim that it, like a social club, should be free to deny the economic benefits of its membership in an arbitrary or discriminatory manner. See *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329 (1945). But see *Oliphant* v. *Brotherhood of Locomotive Firemen*, 262 F. 2d 369 (6 Cir.), cert. denied, 359 U. S. 935 (1959). On this record, we would conclude that DGA has such influence over the employment of directors as a result of this merger.

We think the New York courts would permit a union to enforce any reasonable provision in its constitution and by-laws regardless of whether the provision was enacted prior to the admission of the member who disobeys it. See *Dyer* v. *Occidental Life Ins. Co.*, 182 F. 2d 127 (9 Cir. 1950). Union issues and interests change with time; surely the union must be free to amend its operative rules in response to such changes. That a change in a union's constitution is adverse to the interests of some members is not by itself proof that the change is unreasonable. In the only case in point, a lower New York court upheld a union expulsion based upon an amendment of the union's constitution which prohibited Communist party membership. *Weinstock v. Ladisky*, 197 Misc. 859, 98 N. Y. S. 2d 85 (Sup. Ct. 1950). We see no good reason to reject that decision.

Plaintiffs' other argument,[8] and the one with which we agree, is that failure to sign the DGA oath is an unreasonable substantive ground for expelling a member from his union.

Despite numerous dicta to the effect that a court will not review the "merits" of a union expulsion, see *Madden* v. *Atkins*, 4 N. Y. 2d 283, 297, 174 N. Y. S. 2d 633, 643, 151

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[8] We do not accept any suggestion by plaintiffs that their "expulsion" was wrongful because they were not afforded a procedurally adequate hearing; no hearing is necessary to determine that plaintiffs did not sign the oath. Cf. *Figueroa* v. *National Maritime Union*, 342 F. 2d 400, 406 (2 Cir. 1965), reversing 55 L. R. R. M. 2743 (S. D. N. Y. 1964). A more refined argument would be that this summary expulsion was an arbitrary action because an inference of disloyalty may not reasonably be derived from a member's failure to sign the oath. See *Heckler* v. *Shepard*, 243 F. Supp. 841, 848-49 (E. D. Idaho 1965) (three-judge court). Although we do not consider this question, we think it is far preferable to base union expulsion upon the commission of an objective act of disloyalty or subversion, such as Communist party membership, see *Dakchoylous* v. *Ernst*, note 11 *infra*, so that the accused member is given an opportunity to establish that he is worthy of membership.

N. E. 73, 80 (1958) (concurring opinion), in a large group of New York cases expulsions have been voided when the substantive ground for the union's action was unreasonable, against public policy, or "contrary to natural justice." See generally Cox, *supra* at 615; Summers, Legal Limitations on Union Discipline, *supra*. This doctrine has been used to police a multitude of sins. For example, it has been invoked when an expulsion was purportedly based upon a cause "so trivial and unimportant as to suggest bad faith on the part of the union." *Tesorio* v. *Miller*, 274 App. Div. 670, 88 N. Y. S. 2d 87 (1949). More frequently, it has been used to prevent unions from punishing members who criticize union officers, or who exercise their civil and political rights contrary to the wishes of the union's officers.[9]

In determining the reasonableness of the substantive provision upon which a union expulsion is based, the New York courts seem to have adopted the prima facie tort approach: they look to whether the union was justified in expelling the member for the reason given. Compare note 6 *supra*. In deciding this question, the courts will examine whether the provision is necessary for the union's welfare and whether it was invoked in good faith and without malice. See *Nilan* v. *Colleran*, 283 N. Y. 84, 27 N. E. 2d 511 (1940); *O'Keefe* v. *Local 463*, 277 N. Y. 300, 14 N. E. 2d 77 (1938). In this case, there is no charge that the DGA oath requirement was applied to these plaintiffs in bad

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[9] See *Madden* v. *Atkins*, *supra* (members criticized union officers); *Angrisani* v. *Stearn*, 167 Misc. 728, 3 N. Y. S. 2d 698 (Sup. Ct.), aff'd memo., 8 N. Y. S. 2d 997 (1938) (member sued the union and its officers); *Reilly* v. *Hogan*, 32 N. Y. S. 2d 864 (Sup. Ct.), aff'd memo., 264 App. Div. 855, 36 N. Y. S. 2d 423 (1942) (member charged union officers with misappropriating funds) (dictum); Summers, 64 Harv. L. Rev. at 1068-69. See also *Gallaher* v. *American Legion*, 154 Misc. 281, 277 N. Y. Supp. 81 (Sup. Ct.), aff'd, 242 App. Div. 630, 271 N. Y. Supp. 1109 (1934) (local post asserted a position on legislation at odds with that of national organization).

faith. Our only questions, therefore, are whether the union has a bona fide interest in excluding Communists and other subversives from membership and, if so, whether the DGA oath is a reasonable method of furthering that interest.

In our opinion, the union's interest in guarding against the danger of Communist infiltration is not, as a legal matter, open to question. The legislative history of the recent Labor Management Reporting and Disclosure Act is replete with discussions and proposals which demonstrate that Congress intended to leave unions free to keep out Communists.[10] As early as 1947, thirty national and international unions had provisions excluding Communists from membership, see Summers, The Right to Join a Union, 47 Colum. L. Rev. at 34, and numerous judicial decisions have upheld the propriety of such a rule.[11]

Some commentators have criticized any attempts by unions to regulate the "external" political beliefs of their membership. See Aaron & Komaroff, Statutory Regulation of Internal Union Affairs, 44 Ill. Rev. 631, 655 (1949). However, we think it not unreasonable to believe that the Communist party has in the past demonstrated that it

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[10] Indeed, Congress has twice acted against the danger to the public when Communists serve as union officers. N. L. R. A. § 9(h), 29 U. S. C. § 159(h); L. M. R. D. A. § 504, 29 U. S. C. § 504. The first of these provisions was repealed in 1959 and the second was declared unconstitutional (as a bill of attainder) in *United States* v. *Brown*, 381 U. S. 437 (1965). Nevertheless it seems clear that the national public policy against Communist infiltration of unions retains vitality.

[11] See, e.g., *Dakchoylous* v. *Ernst*, 203 Misc. 277, 118 N. Y. S. 2d 455 (Sup. Ct. 1952), aff'd, 282 App. Div. 1101, 126 N. Y. S. 2d 534 (1953); *Weinstock* v. *Ladisky, supra; I. A. M.* v. *Friedman*, 252 F. 2d 846 (D. C. Cir. 1958); *Rosen* v. *District Council No. 9*, 198 F. Supp. 46 (S. D. N. Y. 1961); *Tisa* v. *Potofsky*, 90 F. Supp. 175 (S. D. N. Y. 1950) See also *Ames* v. *Dubinsky*, 5 Misc. 2d 380, 70 N. Y. S. 2d 706 (Sup. Ct. 1947).

poses a significant threat to the American labor movement. Perhaps in some unions this threat would be sufficiently met by a provision prohibiting Communists from holding union office. But in an organization such as DGA, whose members perform vital tasks in the sensitive communications industry, we cannot say that a provision excluding Communists from any membership is contrary to public policy or "natural justice." The former "witch hunts" and "blacklisting" of DGA members by the public and by the Hollywood film industry would have justified DGA's adoption of some form of exclusionary provision for its own self-protection. Thus, we do not consider DGA's purpose in enacting its oath unreasonable.

Our condemnation of the DGA oath is a narrow one, namely, that this particular oath, because of its vagueness, is an impermissible method of furthering the union's valid interest in protecting itself against Communist infiltration. As to this question, there are no cases directly in point. However, we are guided by the recent Supreme Court decisions which have struck down broad and vague loyalty oaths applied as a condition precedent to various kinds of government employment. See *Elfbrandt* v. *Russell*, 34 U. S. L. Week 4347 (April 18, 1966); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961); *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716, 725 (1951) (concurring opinion of Mr. Justice Frankfurter).[12]

Any loyalty oath aimed at uncovering subversives is subject to the obvious criticism that it is likely to be ineffective because subversives as a rule will not hesitate to sign it. Nevertheless, when dealing with the DGA situa-

[12] These cases are useful for the light they shed on the practical effects of loyalty oaths. We do not in any way intimate that unions are subject to the same constitutional restrictions as governmental subdivisions. See *Oliphant* v. *Brotherhood of Locomotive Firemen*, 262 F. 2d 359 (6 Cir.), cert. denied, 359 U. S. 935 (1959).

tion, the union can reply that an oath serves the laudable purpose of allaying the public's fears that the union has been infiltrated by Communists. Whether or not adoption of an oath is a rational indication of a union's patriotism, we cannot say that this argument is without merit.

However, the specific oath adopted by DGA is subject to more serious criticism. In the first place, as the affidavits filed by plaintiffs in this case illustrate, this oath like N. L. R. A. § 9(h) is offensive to non-Communist labor leaders. See also *United States* v. *Brown*, 381 U. S. 437, 477 (1965) (dissenting opinion). In the second place, because of its vagueness, the oath is a potential weapon for the punishment of those members who differ politically from the union's majority or who challenge the union's leadership.

Most important, the vagueness of this oath makes it impossible for signers to know exactly what it is that they are forbidden to do. What does it mean, for example, to "believe in . . . any organization that believes in . . . the overthrow of the United States government by any illegal or unconstitutional methods"? By such broad language, the oath may place substantial restrictions on the political activities of those who sign it conscientiously. It discourages them from joining political and other associations and from espousing controversial political positions. As Mr. Justice Frankfurter explained in his concurring opinion in *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. at 727-28:

> Not only does the oath make an irrational demand. It is bound to operate as a real deterrent to people contemplating even innocent associations. How can anyone be sure that an organization with which he affiliates will not at some time in the future be found by a state or National official to advocate overthrow of government by 'unlawful means' [in the DGA

> oath, 'illegal methods']? All but the hardiest may well hesitate to join organizations if they know that by such a proscription they will be permanently disqualified from public employment [here union membership, which significantly affects employment]. These are considerations that cut deep into the traditions of our people.
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> * * *
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> Such a demand is at war with individual integrity; it can no more be justified than the inquiry into belief which Mr. Justice Black, Mr. Justice Jackson and I deemed invalid in *American Communications Assn.* v. *Douds,* 339 U. S. 382 [which involved an oath substantially identical to the one here, see text at note 1, *supra*].

Not only do the vague portions of the DGA oath seem to limit unreasonably the political freedom of the union's membership, but we also fail to see sufficient connection between failure to sign the oath and the union's interest in weeding out Communists. Normally, while a union may engage in political activities as an organization, it has no justifiable interest in regulating the political beliefs of its membership, at least where those beliefs have not been translated into conduct that is inimical to the union's interests. See Cox, 72 Harv. L. Rev. at 617-18. An exception is made in the case of Communist beliefs because it has been established that those who harbor such beliefs have an overriding loyalty to an ideology at odds with that of the American labor movement, and because of the great likelihood that Communists will use their influence in unions to foster illegal and undesirable activity such as the political strike. See *Communications Ass'n* v. *Douds,* 339 U. S. at 425-33 (opinion of Mr. Justice Jackson). But when a union

chooses to expel persons because of suspected Communist beliefs rather than objective harmful conduct, we think that the basis for its suspicion must truly indicate dangers against which the union is justified in acting. Here, those aspects of Communism which seriously threaten the union's interests are not present in the milder forms of beliefs and organizations which members who signed the oath might well be discouraged from espousing, supporting or joining. Therefore, those who refuse to sign such a broad oath do not necessarily manifest the type of political beliefs which the union may properly guard against. Under these circumstances, we think that this oath goes beyond what the union's interests reasonably require, that its enforcement serves to deter the political activity of the union members, and that failure to sign it is an insufficient indication of Communist beliefs to warrant expulsion from the union.

We do not challenge the union's right to exclude or expel a person from membership if it is established that he has engaged in subversive activity or if it is established that he is a member of the Communist party. See *Rosen* v. *District Council No. 9*, 198 F. Supp. 46 (S. D. N. Y. 1961). Nor do we necessarily condemn all forms of union loyalty oaths. But, no matter what reasons led to its enactment, or how the union has chosen to enforce it, we cannot uphold those portions of this DGA provision which do not serve the valid purpose of weeding out Communists and subversives, and which may seriously encroach upon the political freedom of individual DGA members.

There has been no suggestion raised in this suit that the plaintiffs are in fact members of the Communist party or of any subversive organization. Plaintiffs' affidavits reveal that they are film and television directors of long standing who have worked for such employers as the United Nations, the United States Navy, the United States Information Agency, the State of New York, the Radio Free Europe

Fund, and many others. Plaintiffs have attacked the DGA oath solely as a matter of principle and DGA has chosen to defend the oath on that basis. Since the only question of fact which the union has claimed is relevant involves whether DGA has a bona fide interest in excluding Communists from membership, a question which we decide in the union's favor, and since we hold as a matter of law that the DGA oath is unreasonable because of its inherent vagueness, we see no reason for remanding the case for trial on the "merits."

However, the case must be remanded for the fashioning of appropriate relief. Although reinstatement—perhaps we should say admission—of plaintiffs to DGA without regard to their signing the oath is clearly warranted, triable issues may well develop with respect to the scope of the final order. Accordingly, the cause is remanded for further proceedings consistent with this opinion.

APPENDIX C

Opinion of the District Court

[103]

JUDGMENT, ORDER AND OPINION OF COURT BELOW ON MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

LEVET, *D.J.*

The plaintiffs, members of the Screen Directors International Guild (SDIG), seek by means of an order to show cause a preliminary injunction and a temporary restraining order enjoining the defendant, Directors Guild of America, Incorporated (DGA), from (a) counting the ballots submitted by members of the SDIG for the election of two representatives to the DGA National Board and thirteen members of the DGA Eastern District Council; (b) effectuating the election being conducted by those ballots; (c) refusing to accept plaintiffs as members of the DGA; and (d) refusing to count ballots submitted by them for the election of representatives to the DGA National Board and Eastern District Council.

The dispute here arises from the planned merger of the SDIG and the DGA. On or about July 19, 1965, an agree-
[104]
ment for the prospective merger of the SDIG and the DGA was adopted by both unions and preparations have been made for execution of the final agreement on October 9, 1965. Under the agreement, the SDIG will disappear and the DGA will continue as the exclusive collective bargaining representative for the industry in which the plaintiffs are employed. The agreement provides that SDIG members will automatically continue their union membership as members of the DGA if they swear to an oath that:

"I am not a member of the Communist Party or affiliated with such party, and I do not believe in, and I am not a member nor do I support any organization that believes in or teaches the overthrow of the United States government by force or by any illegal or unconstitutional methods."

This oath now is and has been required of all DGA members by that organization's constitution. No such oath, however, has ever been required from SDIG members by their union. The plaintiffs now refuse to sign such oath and as a result will be denied both participation in an election[1]
[105]
to determine the representatives of the SDIG members to the combined union and membership in the new organization.

The required oath, thus, is at the heart of the matter before the court. The plaintiffs claim that it is an unreasonable condition on their continuance in union membership and as such that it is illegal and unconstitutional. Further, they request that a preliminary injunction be issued in order to prevent the irreparable injury, which they claim will result to them, if they are not allowed participation in the election and membership in the union until such time as this case is finally determined.

A preliminary injunction is an extraordinary remedy. It is granted only upon a clear showing that the party seeking the injunction is likely to prevail at trial, and where the court finds that the complaining party will suffer irreparable injury for which damages will not compensate. Salz-

[1] On or about August 28, 1965, all SDIG members received a ballot with instructions that they will not be considered a DGA member and that their ballots will not be counted in the election unless they have sworn to the oath. Ballots are to be counted during the week of September 27, 1965, and when the merger agreement is signed the representatives elected will take office.

handler v. Caputo, 199 F. Supp. 554 (S. D. N. Y. 1961); Ambassador East, Inc. v. Shelton Corners, Inc., 120 F. Supp. 551 (S. D. N. Y. 1954).

Anti-communist provisions in union constitutions have been before the courts previously and have weathered judicial scrutiny. See e.g., Rosen v. District Council No. 9 of New York City of the Bhd. of Painters, 198 F. Supp. 46, 49-50 (S. D. N. Y. 1961), appeal dismissed 326 F. 2d 400 [106]
(2d Cir. 1964); Weinstock v. Ladisky, 197 Misc. 859, 98 N. Y. S. 2d 85 (Sup. Ct. 1950). Further, the "Bill of Rights" of union members delineated in 29 USCA §§ 411-415, with its broad statement of rights, permits reasonable qualifications thereof in a union's constitution and by-laws. 29 USCA § 411(a)(1), (2). In light of these authorities, I must conclude that the plaintiffs have not made a clear showing that they are likely to succeed.

Neither have the plaintiffs shown that irreparable injury will result if the preliminary injunction is denied. They claim that lack of union membership will be a serious impediment to securing employment opportunities. It would seem, however, that damages will compensate for any lost employment. Also, no showing has been made that irreparable harm will result if the plaintiffs' ballots are not counted in the forthcoming election.

Accordingly, the plaintiffs' motion for a temporary restraining order and a preliminary injunction is denied.

APPENDIX D

Memorandum Endorsement Denying the Motion to Reargue

[116]

Motion for leave to reargue denied. I see no ground for granting this.

* * *

So ordered.

Dated: New York, N. Y.
October 27, 1965

RICHARD H. LEVET,
U. S. D. J.

Filed Oct. 27, 1965

APPENDIX E

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of July one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
" STERRY R. WATERMAN,
" ROBERT P. ANDERSON,
Circuit Judges.

LEO HURWITZ, LEE R. BOBKER, ROBERT BRAVERMAN, GENE SEARCHINGER, DARRELL RANDOM, and HILARY T. HARRIS, on their own behalf and on behalf of all others similarly situated as members of the SCREEN DIRECTORS INTERNATIONAL GUILD,

Plaintiffs-Appellants,

v.

DIRECTORS GUILD OF AMERICA, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix E—Judgment of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for further proceedings in accordance with the opinion of this court with costs to the appellants.

A. Daniel Fusaro,
Clerk.